UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

BAY MILLS INDIAN COMMUNITY, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, LITTLE RIVER BAND OF OTTAWA INDIANS, and LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Plaintiff-Intervenors,

v

STATE OF MICHIGAN, et al.,

Defendants.

Case No. 2:73-cv-26

HON. PAUL L. MALONEY

COALITION TO PROTECT MICHIGAN RESOURCES' AND BAY DE NOC GREAT LAKES SPORTS FISHERMEN'S REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE

Dated: August 1, 2022

INTRODUCTION

The Coalition to Protect Michigan Resources ("CPMR") and Bay de Noc Great Lakes Sports Fishermen ("GLSF") (jointly, "Intervenors") seek intervention to protect the natural resources of the state of Michigan and to defend and assert the rights of recreational users, as well as Intervenors' members' substantial rights, in the full and fair enjoyment of the natural resources of the Great Lakes as affected by the Treaty of 1836. In response to Intervenors' motion and brief, the Parties' filed responses (collectively, the "Responses") attempting to raise the bar for mandatory and permissive intervention under Fed. R. Civ. P. 24(a) and (b). (See ECF 1970, at PageID.11090-297, 1972-1974, at PageID.11301-313, PageID.11314-338, and PageID.11339-393.) The Parties use the Confidentiality Agreement as a gag order erroneously suggesting Intervenors have not established the basis for intervention.

The Sixth Circuit rejected similar arguments raised by the Responses just last week when it decided that a local association of property owners could intervene in a case that is scheduled to proceed to trial in three weeks. See *Wineries of the Old Mission Peninsula Assn. v. Peninsula Twp.*, No. 21-1744, 2022 WL 2965614, at *1 (6th Cir. July 27, 2022) (attached as **Exhibit A**) (the "*PTP Decision*") (reversing the Court in its denial of Protect the Peninsula, Inc.'s ("PTP") request to intervene as a party because its interests were not adequately represented by a local government). The *PTP Decision* is particularly instructive for this Court as the Sixth Circuit specifically addressed the question of adequate representation, holding that the local government cannot be presumed to represent PTP's interest, in that case saving governmental regulations, even where such interests may overlap with interests of all citizens within the government's jurisdiction. The Sixth Circuit recognized that the government's larger interest in representing the masses actually weighed in favor of letting an association representing a segment of those interests become a party.

Interestingly, in the Responses alleging Intervenors' lack of substantiated evidence, the State of Michigan concedes and acknowledges its disagreements with Intervenors on "narrow issues" (being those exact issues surrounding the areas where Intervenors fish and enjoy the Great Lakes).[1] The State's concession, together with Intervenors' articulated reasons make it virtually indisputable that the State cannot be deemed by this Court to adequately represent Intervenors' interests (the basis, in part, that this Court has relied upon to deny Intervenors party status previously).

The Parties also threaten Intervenors for what they have disclosed already as violating the Confidentiality Agreement among the Parties while asserting that Intervenors fail in supporting their factual assertions in favor of intervention. This threat is disingenuous as Intervenors have complied with the Agreement,[2] and the Parties can agree to waive provisions of the Agreement and allow substantive proofs to be presented to this Court. Intervenors are prepared to provide substantiated proof through affidavits of its members if the Parties waive objection under the Confidentiality Agreement or under the direction and order of this Court allowing filing under seal, in-camera review, or providing testimony in a closed hearing. Intervenors rightfully fear retaliation of the Parties given the prior "punishment" the Parties imposed on CPMR by the removal of its lead counsel for multiple negotiation sessions for alleged violations of the Confidentiality Agreement.

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[1] Intervenors note that while the State certainly has divergent views, it further disagrees with Intervenors that these are "narrow issues." Intervenors certainly disagree with the State's representation on the "broad issues" as well.

[2] Intervenors have not disclosed nor discussed any proposal or counterproposal of any Party nor have they disclosed nor discussed any of the Parties' discussions. The Confidentiality Agreement does not bar discussion of the general subjects at issue, such as those issues addressed by the 2000 Consent Decree.

Intervenors' focused reply does not concede nor waive any of their arguments in their Motion and Brief, and the failure to respond to a particular Party's response is not agreement with that Party's argument. Intervenors will provide further detail below where it is best understood in context.

DISCUSSION

I. THE PTP DECISION SHOWS THAT THE STATE OF MICHIGAN DOES NOT ADEQUATELY REPRESENT INTERVENORS.

When presented with the predecessors and member organizations of Intervenors' previous requests to intervene, this Court and the Sixth Circuit have, in part, denied intervention based on a finding that the State adequately represents Intervenors. (See ECF 1972, PageID.11306.) Importantly, "[t]he adequacy of representation can change during a lawsuit depending on the representative party's underlying incentives for litigating the case." *PTP Decision*, Case No. 21-1744, at *11. None of the Parties' address this truism, presuming that because the State has been found to represent the Intervenors in the past, that must remain to be the case. See *Berger v. North Carolina State Conference of the NAACP,* 597 U.S. ___, slip op. at 13 (June 23, 2022) (holding that a presumption that a governmental entity represents a subset of that government is likely improper); *PTP Decision*, Case No. 21-1744, at *10 (holding that overlapping interests of PTP and the local governmental entity is insufficient to find adequate representation).

The Parties rely on *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005), which involved a prior request by Intervenor CPMR. Notably, *Michigan* made clear that the State must "share the same ultimate objective as a party to the suit." *Id*. at 443-44; (ECF 1973,

PageID.11323).[3] The State and Intervenors, however, do not "share the same ultimate objective." The State substantiates the Intervenors' Motion when it states that it and Intervenors disagree. (ECF 1973, PageID.11327). The State concedes that its positions "do not perfectly align with [Intervenors'] preferred outcomes." (ECF 1973, PageID.11327); *PTP Decision*, Case No. 21-1744, at *10 (reflecting that the government was "frank" in not being able to represent the interests of PTP on a "micro level").[4]

The State also acts as a trustee for the public trust of all citizens of the State, where Intervenors and their membership are focused on their particular interests. *Id*. at *10 (noting that PTP is more selective in its membership than the government in supporting a claim for inadequate representation). "[O]verlapping interests do not equal convergent ones for the purposes of assessing representation under Rule 24(a)." *PTP Decision*, Case No. 21-1744, at *13. The State even acknowledges that it cannot represent Intervenors' interests on the "micro level." *Id*. at *10. This means members of the Intervenors, who have member organizations focused on "micro level[s]" of the Great Lakes fishery, such as the Bays de Noc, Hammond Bay, Leelanau, or Ludington cannot be the sole focus of the State, who has divergent interests acting as trustee for the entire citizenry (including State-licensed commercial fishing interests).

[3] *Michigan* only held there is a presumption of adequate representation if the "same ultimate objective" exists. 424 F.3d 438, 443-44 (2005). The Parties provide no reliable evidence to rebut the State's response that it disagrees with the positions of Intervenors.

[4] Ironically, despite the Parties taking issue with Intervenors' alleged lack of support for its intervention, which Intervenors assert is due to Intervenors' compliance with the Confidentiality Agreement, several Parties make unfounded aspersions that Intervenors' filing is merely a "tactic" rather than address the admitted disagreements between the State and Intervenors. There are, of course, several disagreements between the Intervenors and other Parties over numerous provisions being discussed and tactics employed, all of which Intervenors are prepared to show this Court, if permitted.

While the Parties believe that Intervenors must show an actual future harm that is not speculative if they are to be permitted intervention, the Sixth Circuit disagrees. The "potential" for inadequate representation is sufficient, even when the "certainty about future events" is unclear. *PTP Decision*, Case No. 21-1744, at *10, 14.

II. THE *PTP DECISION* ILLUSTRATES HOW INTERVENORS HAVE SUBSTANTIAL INTERESTS IN THE GREAT LAKES AND TREATY RIGHT CLAIMS TO THOSE RESOURCES.

The Responses argue that Intervenors lack substantial interests because they have no specific property right in fish that are within the Great Lakes. The Parties, however, ignore the fact that Intervenors have, and have had for decades, a continual and abiding interest in the management of the fisheries of the Great Lakes, including all of those issues that impact those fisheries, such as issues related to the exercise of the treaty right, commercial fishing, control of invasive species, stocking types, quantities and amounts, protecting spawning areas, law enforcement and safety on the waters, all of which were addressed in the 2000 Decree and will presumably be addressed in the current dispute over a new decree.[5] For example, the lake trout refuge off Drummond Island remains of significant interest to the Intervenors to protect lake trout rehabilitation and wild fish stock recruitment—an issue that is on a "micro-level" of importance to those members in that area of Lake Huron.

Members of Intervenors have also purchased substantial equipment and operated various fishery-based businesses relying on the principles that were established in the 1985 Consent Decree and earnestly pursued and maintained by the Intervenors and State when negotiating the

[5] Members of CPMR have participated not only in this case, but also regularly address issues related to the Great Lakes fishery at the State and Federal level. For example, representatives of CPMR participated directly in discussions, working groups, and committee hearings over a proposed new commercial fishing law for State-licensed operations. Tribal representatives also participated in those same proceedings.

2000 Consent Decree. The Members of Intervenors are part of communities that have relied upon the success of the 1985 and 2000 Consent Decrees to accommodate recreational fishers while respecting the treaty right. See *United States v. Michigan*, 12 ILR 3083 (August 1985) ("[T]he establishment of long-term state management zones will permit economic development and planning by affected communities and individuals"). Intervenors GLSF have spent more than $100,000 on equipment used to raise fish on behalf of the Michigan Department of Natural Resources based on those same principles. Other member organizations of Intervenors have made similar investments to assist in the raising and recruitment of fishing stocks. The Parties further fail to acknowledge Intervenors' members who are charter captains and members of the Michigan Charter Boat Association ("MCBA"), who hold licenses from the State to conduct fishing operations in waters fished by the Parties. (ECF 1972, PageID.11304.) Members of MCBA have purchased fishing vessels and equipment in reliance upon the 1985 and 2000 Decrees. The State's disagreement on the principles that focus on the "micro level" of the Great Lakes could cause significant harm to their substantial property interests.

Moreover, Intervenors have a right that is protectable. Even though the State manages the public resource in trust, individual citizens and organizations of the state have a right and responsibility to bring suit and correct misdeeds in that management. At a minimum, Michigan's Environmental Protection Act demonstrates that Intervenors have significant interests related to activities that could impair or destroy the Great Lakes fishery. MCL 324.1701 *et seq.*; *Michigan United Conservation Clubs v. Anthony*, 90 Mich. App. 99, 106-07; 280 N.W.2d 883 (1979). The *PTP Decision* reflects that state laws can form the basis to find that "substantial interests" exist. In the *PTP Decision*, the Sixth Circuit confirmed that property owners could have standing to bring a nuisance action under state zoning laws, and thus could satisfy the substantial-interest

requirement of Rule 24(a). *PTP Decision*, Case No. 21-1744, at *8. The various property rights cases relied upon by some of the responses are inapposite to whether Intervenors have substantial interests in assessing a request to intervene, particularly in light of change in the standards for intervention evidenced by the *PTP Decision* and *Berger v. North Carolina State Conference of the NAACP, supra*. (See ECF 1970 and 1974, PageID.11090-297 and PageID.11339-393).

III. THE IMPENDING "CARROT OF SETTLEMENT" FAVORS REJECTING THE NOTION THAT THE REQUEST IS NOT TIMELY AND GRANTING INTERVENTION.

The Parties' Responses are unavailing that Intervenors' motion is untimely. The Sixth Circuit has determined that adequacy of representation is not stagnant and can change as litigation progresses. *PTP Decision*, Case No. 21-1744, at *10-11. The Parties emphasize that a final written settlement is looming, which actually makes clear the necessity and urgency for this Court to grant intervention. As the State notes, the negotiations are approaching a conclusion (ECF 1973, PageID.11329)—precisely when Intervenors have been denied by the Parties, and particularly the State, their ability to participate through the State.[6] Intervention is appropriate when the "the carrot of settlement" is now present. *PTP Decision*, Case No. 21-1744, at *11.

The Responses are particularly unavailing in claiming that Intervenors will cause drastic impacts to the current status of the proceedings when the Parties concede that Intervenors have been present and involved in this matter since its inception. The Intervenors are well-versed in the current negotiations and poised to engage the Parties in the process. The Parties also misdirect this Court by suggesting that Intervenors, as amici, can fairly participate without intervention. (ECF

[6] In addition to its inability to participate directly or to address the Parties directly on matters of particular concern, Intervenors' counsel asked just recently if it could participate in the discussions among counsel that have been occurring over drafting issues. The State was reluctant to even ask and has not responded to the request, thereby denying the Intervenors participation even at the "listening" level.

1972, PageID.11302.) Were this case being actively litigated with pleadings, motions, and hearings before this Court, perhaps Intervenors could participate with filings, which this Court has regularly accepted. During secret negotiations, however, the Parties have limited the Intervenors to casual observers, unable to meaningfully address the Parties in negotiations and only allowed to participate through the State who filters Intervenors' comments and readily admits it rejects Intervenors' "micro-level" interests. (ECF 1966-2, PageID.10974, Para 12; ECF 1875, PageID.2143-45). This Court should not take the bait and conclude that Intervenors' current status as amici in secret negotiations could satisfy Fed. R. Civ. P. 24.[7]

Moreover, it is certainly not too late. In the *PTP Decision*, the Sixth Circuit reversed, requiring intervention when only three weeks remain before the parties convene for trial before this Court and where settlement discussions have been ongoing. The *PTP Decision* was further entered, granting party status, after this Court determined liability under numerous constitutional claims. The Sixth Circuit even condoned PTP returning to this Court to raise arguments regarding supplemental jurisdiction on claims already decided by the Court. *PTP Decision*, Case No. 21-1744, at *14.

The Parties' various concerns (ECF No. 1972, PageID.11308-11309) regarding policy and opening the flood gates has already been rejected by the United States Supreme Court and Sixth Circuit. *Berger*, 597 U.S. at 2205; *PTP Decision*, Case No. 21-1744, *12.

Intervenors filed their motion as soon as the State's representation of Intervenors' interest drastically changed during these negotiations, including when proposals, responses to proposal, and discussions were no longer shared with Intervenors by the State. In fact, the State has recently

[7] Were Intervenors permitted to participate as "litigating amici," the result might be different. Such an option not longer exists, however, so intervention is the only remedy for this Court to grant.

instructed Intervenors that it would not share certain proposals and responses and directed that it obtain it from the Parties.

Moreover, Intervenors have no interest in preventing a negotiated settlement, which is precisely why the Parties' technical nitpick that no proposed responsive pleading was filed must be rejected. This case is rather unique in that the United States originally filed this matter in 1973; Judge Noel Fox issued his decision in 1979 recognizing the treaty right of the Tribal Parties, and thereafter, the parties held further proceedings on allocating and distributing the fishery before Judge Enslen. The case was resolved by two successive consent decrees and has remained "closed" for decades. Intervenors acknowledge the treaty right recognized by Judge Fox and do not seek intervention to litigate issues not previously raised due to the successive negotiated settlements. To the extent a responsive pleading is necessary, Intervenors submit to the Court the 2000 Consent Decree, which maintains the principles of allocation, distribution, gear restrictions, and fishing conditions that have provided the harmonious fishery acknowledged by the Grand Traverse Band (**Exhibit B**).[8] The State has denied Intervenors effective and adequate involvement in this matter, forcing Intervenors to seek redress before this Court.

IV. THE CONFIDENTIALITY AGREEMENT IS NOT VIOLATED BY INTERVENORS' MOTION AND BRIEF.

Intervenors would present further substantiated evidence before this Court, but as the Grand Traverse Band remarks: "The dilemma, however, is that the parties and Proposed Intervenors are bound by a confidentiality agreement—thus facts specifically refuting erroneous

[8] Intervenors further recognize that that the uniqueness of this case is also present in its filings and lack of available pleadings. The electronic docket only goes back to 1984, meaning that the original complaint is not retrievable. Intervenors have previously proposed responsive pleadings to the United States' Supplemental Complaint, but that complaint was the focus of inland treaty rights that are not issue. (See ECF 1501, at PageID.2731-83 and 1504, at PageID.9-16.)

assertions should not be disclosed." (ECF No. 1974, PageID.11341.) Intervenors did not violate the Confidentiality Agreement in their filings. The Confidentiality Agreement provides, in relevant part, as follows:

8. "This Agreement shall govern all proposals, responses to proposals, and discussion among the Parties regarding a new consent decree . . ." (ECF 1966-2, PageID.10974).

9. "No Party nor amicus shall disclose any proposal, response to a proposal, or the substance of any discussion" regarding a new consent decree. (*Id.*)

10. "[P]roceedings under this Agreement . . . shall be confidential and ***shall not*** be reported, recorded, ***placed in evidence***, or disclosed to anyone not a Party." (*Id.* at PageID.10974, Para. 11.)

In respecting the terms of the Confidentiality Agreement, Intervenors did not disclose "proposals," "responses to proposals," the "substance" of any "proposals," nor the substance of "discussions" with the Parties regarding a new consent decree—particularly "discussions" with the State which would further substantiate Intervenors' Motion. If they wish, the Parties can waive the Confidentiality Agreement so that CPMR can present additional evidence. (*Id*. at PageID.10974-75.)

Instead, the Parties, use the Agreement as a gag order. (ECF 1973, PageID.11324-25) (The State remarks: "Proposed Intervenors have offered no proof otherwise"). The Confidentiality Agreement is a shield to protect, not a sword to thwart. This Court can provide Intervenors the opportunity to fully support their Motion by permitting Intervenors to file affidavits under seal, review various documents via in camera review, or conduct a closed hearing. The members of Intervenors, however, otherwise fear retaliation of the Parties as threatened by the Parties in the Responses. Intervenors maintain that their filings have not violated the Confidentiality Agreement, and the Parties wholly misread the intent and scope of the Agreement.

CONCLUSION AND RELIEF

The Court should grant the Motion to Intervene as of right under Rule 24(a) or, in the alternative, it should grant permissive intervention under Rule 24(b) for Intervenors to be defendant parties in this case.

Respectfully submitted,

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Dated: August 1, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply is drafted in compliance with the local rules. This Reply's Word Count is 3,602 words. I prepared this Reply on Microsoft Word and relied upon its word count function for the purposes of this Certificate of Compliance.

Respectfully submitted,

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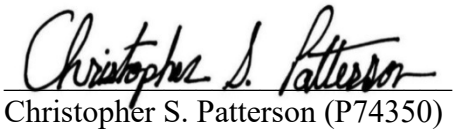

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Dated: August 1, 2022

CERTIFICATE OF SERVICE

I, Kaylin J. Marshall, hereby certify that on the 1st day of August, 2022, I electronically filed the foregoing document with the ECF system which will send notification of such to all parties of record.

/s/ Kaylin J. Marshall
Kaylin J. Marshall